89-207

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1988

SCOTT A. BRAINERD,

Petitioner,

v.

MASCO CORPORATION OF INDIANA

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

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QUESTIONS PRESENTED

1. Whether petitioner should have been sanctioned under Federal Rule of Civil Procedure 11 for persisting in requesting an evidentiary hearing as to the truth or falsity of the admitted accusation of opposing counsel, which accusation said counsel refused to retract, that petitioner had feloniously filed a fraudulent transcript under oath in this action.

2. Whether petitioner was denied due process of law by the magistrate's communications with the district judge, and by the district judge, who pre-judged petitioners' objections to the magistrate's order, stating that he would increase the sanctions upon petitioner if appealed, (which he in fact subsequently did), and who refused to rule on petitioner's motion for recusal.

LIST OF PARTIES

Petitioner is an individual engaged in the practice of law in the State of Illinois. Petitioner was counsel for plaintiff in the underlying action.

Plaintiff below was Magnus Electronics, Inc., an Illinois Corp.

Defendants below included:

Respondent, Masco Corporation of Indiana
Browning Communications Corporation
RTD Corporation
A.N. Fischer, an Illinois resident

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For The Seventh Circuit

Petitioner requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit filed on March 22, 1989, and its judgment entered in accordance therewith on May 22, 1989.

Opinions Below

The decision of the Court of Appeals for the Seventh Circuit, to which the issuance of a writ of certiorari is sought, is dated March 22, 1989. That decision is recorded at 871 F. 2d 626 (7th Cir. 1989) and it affirmed in majority part the judgment of the

United States District Court for the Northern District of Illinois awarding sanctions against petitioner and Brainerd & Bridges, a partnership engaged in the practice of law. The Court of Appeals' decision appears as Appendix A hereto.

The decision of the United States District Court for the Northern District of Illinois is reported at 118 F.R.D. 443 (N.D. Ill. 1988). The District Court's decision affirmed the opinion of Magistrate W. Thomas Rosemond, and imposed further sanctions upon petitioner. The District Court decision appears as Appendix B hereto.

The decision of the magistrate is dated September 25, 1986. That decision appears as Appendix C hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 22, 1989, affirming in majority part the decision of the district court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provision and Rules Involved

The 14th Amendment to the Constitution provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. §455(a) provides in pertinent part:

> "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Code of Professional Responsibility, DR 1-102, 103 provides:

Disciplinary Rule 1-102. Misconduct

(a) A lawyer shall not
(1) violate a disciplinary rule;
(2) circumvent a disciplinary rule through actions of another;
(3) engage in illegal conduct involving moral turpitude;

(4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or
(5) engage in conduct that is prejudicial to the administration of justice.

Disciplinary Rule 1-103. Disclosure of Information to Authorities

(a) A lawyer possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct or lawyers or judges.

Disciplinary Rule 5-102(b). Withdrawal as Counsel When the Lawyer Becomes a Witness

If, after undertaking employment in pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Statement of the Case

This case presents two questions of professional ethics concerning the propriety of communications between opposing counsel and magistrate and reviewing judge. The issues herein do not involve sizeable sums of money but broad ethical questions of great practical significance in the everyday workings of "hardball" litigation.

The facts of the underlying case and its relationship to petitioner Scott A. Brainerd follow. In April, 1984 Masco Corporation of Indiana, an NYSE company, seized approximately $300,000.00 of plaintiff Magnus Electronics, Inc.'s wholly-paid-for radio-telephone inventory, which was kept on the premises of defendant Browning Communications, Inc., a supplier whom Magnus had financed in the sourcing and

procurement of such sets. Masco was a controlling shareholder of Browning. Masco claimed it seized the inventory by virtue of a security interest in Browning assets. Masco was aware, however, that Magnus had paid in full for its inventory, and was the lawful owner of the inventory.

Magnus made demand for the return of its inventory. Masco, admitting Magnus enjoyed a "superior claim" to the goods, relinquished possession but exacted from Magnus as a condition of the return of Magnus' own property, the execution of a "release" of all of Magnus' claims against Masco. Magnus discovered shortly thereafter that Masco had "stripped" Magnus' inventory of internal components before causing Magnus to sign the release. Plaintiff's counsel did not "negotiate" the terms of the release nor were they present at the time of its signing by Magnus. Their involvement was limited to demanding, on behalf of plaintiff, the return of the goods, and receiving demands for the release in question.

In January, 1985 Magnus filed a complaint alleging invalidity of the release based on lack of consideration and fraud. Masco counterclaimed for breach of the release contract, and fraud. Upon entering the case, Masco's attorney Greenough came with his client to Andrew Brainerd's office to discuss settlement, tendering to Brainerd a signed confession of judgment against Masco in the sum of $20,000. After brief civilities and plaintiff's refusal of the offer, Greenough accused Brainerd of deliberately generating unwarranted fees. Brainerd found these assertions insulting and cautioned Greenough ". . . not to make any further derogatory references of that kind."

On September 11, 1985, after a discovery hearing and in the elevator of the federal building when witnesses were present, attorney Greenough accused Brainerd of filing a fraudulent deposition transcript. This accusation charged Andrew Brainerd with the commission of a felony under 18 U.S.C. §§1001, 1506 and 1623 in direct connection with the proceeding, and was absolutely untrue. Brainerd's written demand for a retraction was refused, and Brainerd appeared within days before Magistrate Joan Gottschall for "an evidentiary hearing on the truth of such charges, or to refer same to the Executive Committee for disciplinary action." Magistrate Gottschall questioned her

power to hear this matter, whereupon Judge Leighton upon motion ordered that Magistrate Gottschall "may conduct an evidentiary hearing on the contempt issue, impose sanctions if necessary and make rulings as required."

At about the same time, Masco began a series of attempts to disqualify Brainerd & Bridges as counsel for plaintiff. Masco moved to stay discovery for the purported reason that attorneys Andrew and Scott Brainerd were potential witnesses to the "release", hence should be immediately disqualified. Magistrate Gottschall denied this motion, holding that Masco's claim to a witness-advocate problem did not present a "conflict of interest" situation, but rather the question whether plaintiff's attorneys could appear as counsel at trial. Magistrate Gottschall also ordered the evidentiary hearing on Mr. Greenough's accusation to be held on January 16, 1986, but before this hearing was held the case was reassigned from Judge Leighton to Judge Duif and the evidentiary hearing and other discovery matters were reassigned to Magistrate Rosemond.

The events which constitute the basis of this petition began with Magistrate Rosemond. After considering plaintiff's motion for a hearing as to whether Andrew Brainerd filed false documents under oath, the magistrate ruled that "the Court will not waste its valuable time on a matter stemming from the complete breakdown and cooperation of professional behavior amongst counsel"; that plaintiff's "pressure to have an evidentiary hearing" was "clearly dilatory, irrelevant. . . a red herring." The magistrate stated in his September 25, 1986 (Appendix "C") that "pursuing an evidentiary hearing on the truth or falsity of certain unflattering statements made by opposing counsel" was a "complete waste of time, effort and money." Plaintiff's counsel, he stated, "set the tone in the matter right from the very beginning" with the evidentiary hearing matter.

Thereafter, in a lengthy hearing on April 2, 1986, Magistrate Rosemond, clearly alienated by plaintiff's request for the hearing, ruled approximately twenty-six (26) consecutive times in Masco's favor and against plaintiff, reversing most of the standing orders of Magistrate Gottschall, some of which had resulted from lengthy prior hearings. From that day until the case was ultimately settled in 1987, Magistrate Rosemond granted every

motion made by Masco and denied every motion made by plaintiff.

On April 7, 1986, the magistrate prohibited plaintiff's counsel from pursuing discovery on the case based purely on Mr. Greenough's unsubstantiated oral allegations that plaintiff's counsel were fact witnesses. He ordered, plaintiff to tender "an appropriate solution to this conflict of interest problem within 14 days of this Order." *But see Kaiser Steel Corp. v. Coluccio Construction Corp.* 785 F.2d 656 (9th Cir. 1986) (court could find no precedent for trial court's *sua sponte* disqualification of counsel where the lawyer was a possible witness).

On April 17, 1986, plaintiff made a Motion to Reconsider the magistrate's April 7 Order and therein responded to the magistrate's disqualification directive. In addition to citing an unbroken line of cases showing that the magistrate had erroneously placed the burden of proof on plaintiff's counsel to *avoid* disqualification in a witness-advocate situation, plaintiff's counsel tendered affidavits indicating that counsel did not intend to call themselves as witnesses, and that any matters to which they could testify were both immaterial and non-prejudicial to plaintiff's case.[1] This Motion to Reconsider (to which defendant filed an eight-page response, but for which the magistrate awarded over $5,500 in sanctions) also requested the magistrate to reconsider four simple discovery issues which are not germane to this writ, hence are omitted from discussion.

At that point, 16 months into the proceedings, Masco had

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[1] DR 5-102(b) provides:

> "If, after undertaking employment in pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client."

Cf. Optyl Eyewear Fashion Intern. v. Style Companies, 760 F. 2d 1045 (9th Cir. 1985):

> "The drafters of the ABA Code have cautioned that the ethical rules '[were] not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel." *Id.* at 1050.

not moved to disqualify and had not cited authority for the proposition that counsel should be disqualified before trial even if they were witnesses. When plaintiff attempted to amend its complaint, however, Masco argued to the district court that plaintiff should be prevented from filing same because its counsel might have knowledge of the "release". During the course of this motion a long discussion occurred as a result of conflicting orders issued by the magistrate regarding counsel's continued representation. The district court repeatedly pressed plaintiff's counsel, Scott Brainerd, to explain what the judge perceived to be a conflict in minute orders issued by the magistrate on the disqualification issue. Unable to satisfactorily explain them, Scott Brainerd went to the office of Magistrate Rosemond after the district court "passed" the matter to the end of the motion call. Brainerd told the magistrate's clerk that a motion was then in progress and that the district court was pressing counsel for an explanation of the conflicting orders of the magistrate regarding disqualification. Brainerd asked the clerk whether the magistrate would provide a written clarification which would indicate whether or not a disqualification issue was then pending. He did not speak to or see Magistrate Rosemond, nor did he discuss the merits of the case with either the magistrate or his clerk. The clerk entered the magistrate's office and re-emerged with a handwritten note stating that no disqualification issue was pending before him. Brainerd immediately presented this letter to the district court when the motion was recalled.

After Magistrate Rosemond learned of the "letter incident" by way of an *ex parte* communication from defendant's counsel, the magistrate decided to retroactively sanction plaintiff and its counsel under FRCP 11 and 37. He directed defendant to submit a schedule of its attorneys' fees on all matters and costs from April 2, 1986 to May 16, 1986. Although Masco had filed only one 8-page response to the motion to reconsider, the magistrate awarded Masco, $6,793.25, $5,524.25 for plaintiff's Motion to Reconsider, $1,269 for the so-called "letter incident". The Order retroactively assessed fees for time spent by Masco's counsel for weeks prior to the motion to reconsider, including fees bearing no relationship to the discovery process (despite jurisdictional limitations of the referral order), fees for issues on which plaintiff

had earlier prevailed before Magistrate Gottschall, and fees for time on the disqualification issue.

Petitioner was forced to withdraw as counsel for plaintiff because the magistrate's rulings had paralyzed his representation. Before counsel's withdrawal, the magistrate warned petitioner:

> ". . . I will explain to Judge Duff what has happened in my order, there's no doubt about it. . .
>
> "but you should be aware of the fact that I will write it up and I will, as soon as I can, I will point these things out and I will leave it up to Judge Duff to handle. But he will be advised of everything that has occurred, including what has occurred yesterday. And he should also be advised that there should be no mistakes. . . ." Transcript of Proceedings of May 16. 1986 at p. 10, 26.

New counsel was accordingly substituted. The magistrate then warned plaintiff's new counsel that he had spoken with Judge Duff, and that Judge Duff had told him that "if plaintiff or its former counsel appealed this case to him. Judge Duff will increase the amount of sanctions imposed." Affidavit of Andrew Brainerd.

Based on that communication from the magistrate, plaintiff and its former counsel believed that the district court had improperly "pre-judged" the matter without having even heard its version of it. Nevertheless, on September 15, 1986, plaintiff, petitioner and Brainerd & Bridges filed objections to the magistrate's Order of September 5 under F.R.C.P. 72. Plaintiff's former counsel then moved to determine whether recusal was appropriate under circumstances wherein the magistrate had learned the outcome of these objections before objections were filed with the district court. Petitioner argued that the magistrate's dispositive communications with Judge Duff denied due process of law and impaired the independence of the district court's decision-making process.

On January 5, 1988, the district court affirmed the magistrate's order in a three page opinion. Judge Duff refused to rule

on the motion for recusal and adopted the magistrate's decision in its entirety, holding that objectors' allegations were "frivolous attacks upon the magistrate and opposing counsel". As the magistrate had warned, the court awarded Masco "an additional $2,600 in sanctions to cover the costs of defending the appeal" and having to respond to "the Brainerds' continuing frivolity in having asked for an evidentiary hearing with respect to charges of the perpetration of felony crime made by Walter Greenough." The district judge also ordered an additional sanction in the amount of $1,000. *Id.* at 3.

The Seventh Circuit affirmed the district court opinion but vacated the additional $1,000 fine. The Court of Appeals made no reference to the magistrate's communications with the district court and the recusal issue, but found the "due process argument to be without merit."

On the evidentiary hearing matter, The Court of Appeals, omitted any mention of the accusation of felony which had precipitated the entire series of events giving rise to sanctions. The Court found that opposing counsel's accusations constituted mere "disparaging comments" which were irrelevant to the underlying proceeding. The Court then found that petitioner's persisting in the request for an evidentiary hearing as to whether fraudulent documents were filed violated Fed. Rule of Civ. Proc. 11.

REASONS FOR GRANTING THE WRIT

I. Counsel Should Not Have Been Sanctioned For Pursuing An Evidentiary Hearing As To Whether Or Not Fraudulent Documents Were Filed In The Proceeding

Petitioner Scott A. Brainerd and Brainerd & Bridges were sanctioned under F.R.C.P. 11 for pursuing an evidentiary hearing as to whether or not Andrew Brainerd filed a fraudulent transcript under oath in this case. The Court of Appeals found:

> "The district court also refers to the Brainerds' repeated requests for an evidentiary hearing on the allegedly disparaging comments made by Masco's counsel in the elevator. Although we commend Andrew Brainerd

> for attending to his reputation as an attorney and believe that attorneys should be civil to one another both inside and outside the courtroom, we agree with the district judge that belaboring the issue violated Rule 11. . . One attorney's opinion of another, spoken in the elevator outside the courtroom, is normally not relevant to the underlying case and therefore is best ignored." *Id.* at 14.

It is true that Brainerd pressed for an evidentiary hearing. The evidentiary hearing was authorized by Judge Leighton, to whom the case was originally assigned; Judge Duff obviously disagreed as to the propriety of conducting the hearing, calling it "frivolous" and "outrageous." *But see Indianapolis Colts v. Mayor of Baltimore*, 775 F. 2d 177, 182 (7th Cir. 1985) (the fact that judges have disagreed on an issue is significant evidence that the issue is not frivolous).

But more importantly, the accusations made by opposing counsel were not merely "disparaging comments"; nor were they, as the Court of Appeals euphemized, "one attorney's opinion of another"; rather, these accusations were charges of crime which could lead to imprisonment, fine and disbarment. If a lawyer may not ask that a court stop momentarily to consider charges of this gravity and import, petitioner submits that there is something radically wrong with permissible limits of opposing counsel's conduct toward one another. Even in today's climate of "Rambo" litigation, and the privileged nature of statements made in the course of a judicial proceeding, there is a point beyond which mere "opinion" ends, and outright defamation, accusation of crime, begins. Petitioner submits that that limit was surpassed in this case, and that a lawyer should not be obliged to tolerate the unfounded charge of the perpetration of a felony, whether it be made in the course of litigation or not.

Only last year, the Illinois Supreme Court in *In re Himmel*, 125 Ill. 2d 531 (1988) reaffirmed the duty of a lawyer to report misconduct of another lawyer:

> "Informal Opinion 1210 states that under DR 1-103(a) it is the duty of a lawyer to report to the proper tribunal or authority any unprivileged knowledge of a lawyer's

> perpetration of any misconduct listed in Disciplinary Rule 1-102. (ABA Committee on Ethics & Professional Responsibility, Informal Op. 1210 (1972) (hereinafter Informal Op. 1210).) The opinion states that 'the Code of Professional Responsibility through its Disciplinary Rules necessarily deals directly with reporting of lawyer misconduct or misconduct of others directly observed in the legal practice or the administration of justice.' Informal Op. 1210, at 447.
>
> "This court has also emphasized the importance of a lawyer's duty to report misconduct. In the case *In re Anglin* (1988), 122 Ill. 2d 521, because of the petitioner's refusal to answer questions regarding his knowledge of other persons' misconduct, we denied a petition for reinstatement to the roll of attorneys licensed to practice in Illinois. We stated, 'Under Disciplinary Rule 1-103 a lawyer had the duty to report the misconduct of other lawyers. (107 Ill. 2d Rules 1-103, 1-102(a)(3), (a)(4).) Petitioner's belief in a code of silence indicates to us that he is not at present fully rehabilitated or fit to practice law.' (*Anglin*, 122 Ill. 2d at 539.) Thus, if the present respondent's conduct did violate the rule on reporting misconduct, imposition of discipline for such a breach of duty is mandated." *Id.* at 540, 541.

The *Himmel* court held that discipline is mandated where an attorney violates the rule *requiring* him to report misconduct falling within the purview of DR 1-102. The alleged conduct in this case, and the allegation itself, fall within the letter and spirit of DR 1-102. Even if Brainerd was under no affirmative obligation to report the matter, he was not obliged to let the charge lie when retraction was refused.

The Court of Appeals affirmed the award of sanctions under Fed. R. Civ. Proc. 11 against petitioner and Brainerd & Bridges for seeking the evidentiary hearing. Ironically, however, each of the courts below refused to present the true nature of the purported "disparaging comments"; somehow, the charge of filing fraudulent documents under oath became mere "unflattering comments", not worthy of the courts' attention. Each of

the opinions below camouflaged the nature of the "comments" for transparent reasons. It is submitted that if readers of these opinions were apprised of the fact that Brainerds were sanctioned for refusing to tolerate an untrue charge of crime, some sort of professional outrage might well result. Petitioner submits that each of the published opinions below, which have stigmatized petitioner's career, materially distort facts in order to rationally justify the result.

The courts below rewarded unacceptable conduct. Petitioner had a fundamental right, indeed a duty, to petition the court to determine whether or not a felony was committed in proceedings in this case. The fact that the accusation was made just outside the courtroom was immaterial. *Cf. People v. Parker*, 328 Ill. App. 46, aff'd., 396 Ill. 583, aff'd., 333 U.S. 71 (1945). Petitioner therefore requests that this Court reverse the ruling of the Court of Appeals affirming the imposition of sanctions upon petitioner for requesting an evidentiary hearing.

II. The magistrate's Communications With The District Judge, and the Judge's Failure to Rule on the Recusal Motion, Denied Petitioner Due Process of Law

As a result of the request for the evidentiary hearing, the magistrate became visibly angry with plaintiff's counsel. He ruled against plaintiff thereafter on approximately 30 consecutive occasions. Although not discussed in the opinions below, the magistrate reversed standing orders of the prior magistrate without any real consideration. It is not unfair to say that them magistrate did everything in his power to scuttle plaintiff's case

after the evidentiary hearing incident.[2]

During a hearing on May 16, 1986, the magistrate explained to petitioner in court that he would explain all of the events of the "letter incident" to the judge personally. The magistrate told petitioner that Judge Duff would be advised of "everything" and "that there should be no mistakes." Shortly after petitioner's withdrawal the magistrate informed plaintiff's new counsel that he had spoken with Judge Duff and that Judge Duff told him that if "they [petitioner and Brainerd & Bridges] appeal this case to Judge Duff, Judge Duff will increase the amount of sanctions imposed." Affidavit of Andrew Brainerd. Petitioner then moved the district court to determine whether recusal was appropriate under circumstances where the magistrate had informed counsel of the district court's disposition of the matter even before objections were filed under FRCP 72. The district court refused to rule on this motion, however; it affirmed the magistrate's recommendations and, predictably, increased the sanctions against petitioner.

Petitioner concedes that communications between a magistrate and reviewing judge are generally appropriate and administratively necessary. Although no case has been located directly on point, is it submitted the communications in this case were sufficiently suspect and prejudicial that a reasonable person

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[2] In 1988, attorney Andrew Brainerd, who had neither complained of nor been sanctioned by any judicial officer during 38 years as a member of the bar, filed a complaint under 28 U.S.C. §372 against Magistrate Rosemond. He alleged, *inter alia*, that the magistrate (1) retroactively imposed excessive sanctions on matters unrelated to discovery, including time spent on motions before the district court; (2) disregarded relevant law; (3) failed to independently evaluate evidence; (4) failed to give due regard to standing orders of a prior magistrate; (5) "doctored" the record to support factual findings; (6) disqualified counsel's representation without grounds or due process; (7) prejudiced plaintiff's and its counsel's case through improper outcome determinative communications with the reviewing judge; and (8) sanctioned plaintiff's counsel for an *ex parte* contact while simultaneously permitting and engaging in *ex parte* contacts with defendant's counsel.

This complaint was summarily dismissed by the Seventh Circuit after it issued its ruling on the appeal, but the court never addressed the bulk of these allegations.

would have questioned the impartiality and independence of the reviewing judge under these circumstances.

In an analogous context, 28 U.S.C. §455 provides in relevant part:

> "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

See. e.g. U.S. v. Ritter, 540 F. 2d 459 (10th Cir. 1976) (judge should recuse himself where his or her impartiality might reasonably be questioned; bias in favor of or against an attorney can result in bias towards a party.) Without quibbling as to whether or not bias in this case was extra-judicial in nature, petitioner submits that due process constraints required the district court at least to determine whether these outcome-determinative communications transpired. While the Court of Appeals made no reference to the recusal issue, petitioner submits that it was error and an abuse of discretion for the district court not to have ruled on the motion.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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pro se

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(312) 726-1810

Dated: July 19, 1989

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-1268

MAGNUS ELECTRONICS, INC.,

Plaintiff,

v.

MASCO CORPORATION OF INDIANA, an Indiana corporation; R.T.D. CORP., as successor in interest to BROWNING COMMUNICATIONS, INC. and BROWNING COMMUNICATIONS, INC., both Illinois corporations; and A.N. FISCHER, an individual,

Defendants-Appellees.

APPEAL OF: Scott Brainerd and Brainerd & Bridges

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 0494—**Brian Barnett Duff**, *Judge.*

ARGUED SEPTEMBER 22, 1988—DECIDED MARCH 22, 1989

Before BAUER, *Chief Judge*, WOOD, JR., and FLAUM, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* This is a case in which the dispute between the attorneys has outlasted the underlying legal claims. The district judge imposed sanctions pursuant to Rule 11 and Rule 37 of the Federal Rules of Civil Procedure on counsel for Magnus Electronics, Inc. (Magnus) after a long history of friction between opposing

counsels. Counsel for Magnus appeals. We affirm the district judge's sanction of $6,631.13 in attorneys' fees but vacate the district judge's decision to add $1,000 to the amount of attorneys' fees requested.

I. FACTS

This appeal has a convoluted past that we will describe in some detail. Defendant-appellee Masco Corporation of Indiana (Masco), a secured creditor of defendant Browning Communications, Inc. (Browning), seized certain inventory possessed by Browning when it became apparent to Masco that Browning was facing financial difficulties. Plaintiff Magnus promptly complained that some of the inventory seized by Masco actually belonged to Magnus. Masco and Magnus began to negotiate the return of that portion of the inventory that belonged to Magnus. Eventually, Magnus signed a release in exchange for the return of the inventory. Dissatisfied with the goods as returned to it, however, Magnus later claimed that Masco secured the release through fraud and duress. Magnus's counsel, Andrew and Scott Brainerd (the Brainerds),[1] filed a complaint which alleged that the release was void and that Masco was liable to Magnus for damages resulting from Masco's possession of the inventory.

During a preliminary hearing to establish a discovery schedule, Masco raised the issue of whether the Brainerds should withdraw as Magnus's counsel because the Brainerds helped to negotiate the terms of the release agreement in dispute. The Brainerds claimed that they did not negotiate the release for Magnus and did not intend to act as witnesses if the matter went to trial. Faced with a withdrawal problem and counsel who were reluctant to

[1] Andrew Brainerd is Scott Brainerd's father. He was also Magnus's counsel before Scott Brainerd took over.

withdraw, the magistrate[2] ruled that the Brainerds could continue representing Magnus, at least temporarily, but also invited the Brainerds to suggest a solution to the withdrawal problem. This set the stage for what transpired next in the district court.

Apparently attempting to remedy the withdrawal problem by deleting references to its counsel in the pleadings, Magnus brought a motion to amend its complaint before the district judge. The district judge sensed, however, that the substantive withdrawal problem remained unresolved and questioned whether he could rule on Magnus's motion if the withdrawal issue remained before the magistrate. Scott Brainerd argued that the magistrate had definitively ruled on the withdrawal issue in Magnus's favor, but Masco's counsel stated that Masco had a pending request to depose the Brainerds to determine whether they were involved in the release negotiations. The district judge, perplexed by the magistrate's conflicting orders and counsels' arguments, ordered the attorneys to wait until he heard the other motions before him that morning, after which they could continue to argue the issue.

Without disclosing his plans to Masco's counsel seated in the courtroom, Scott Brainerd went to the magistrate's office during this break to obtain a letter explaining the magistrate's position on the withdrawal issue. Scott Brainerd talked to the magistrate's clerk who then spoke to the magistrate. Under the impression that the district judge had asked for a letter, the magistrate wrote to the district judge and Scott Brainerd presented the letter to him. The district judge, however, stated that he would not rely

[2] Actually two magistrates were involved with this case. The first magistrate decided several procedural matters but did not reach much of the substance of this appeal before the case was moved from her docket to the docket of the second magistrate. Unless specifically noted, we are referring to the second magistrate when we discuss "the magistrate's" statements or actions in this opinion.

upon a letter obtained *ex parte* and referred the motion to the magistrate.

When the magistrate realized that the district judge had not himself requested the letter, the magistrate became irritated. He felt that Scott Brainerd had misrepresented the situation to obtain the letter. The magistrate wrote in his subsequent order that, unless the district judge had specifically requested the letter, the magistrate would never have written this hasty missive.

To make matters worse, the magistrate felt that Magnus was not cooperating in discovery. According to the magistrate, Magnus repeatedly challenged his orders, filed a frivolous motion to reconsider, refused to make a witness available for deposition after the magistrate so ordered, requested information that the magistrate ruled had already been provided, and dwelled on matters involving personality rather than the issues of the case. The magistrate had enough. He sanctioned Scott Brainerd, the firm, and the client under Federal Rules of Civil Procedure 11 and 37 for their actions during discovery and for filing a frivolous motion to reconsider the discovery order.

One tangential incident needs to be added at this point, as it bears on some of what the magistrate believed to be the Brainerds' extraneous arguments. Andrew Brainerd claimed that Masco's counsel disparaged him in a public elevator following a status hearing. Andrew Brainerd moved the court for an evidentiary hearing on the "truth of the statements made," but the magistrate denied the motion because he believed that a hearing would be a misuse of judicial resources and a waste of time. Despite the magistrate's ruling, the incident remained on Andrew Brainerd's mind, became one of the issues in the motion to reconsider, and resurfaced again in this appeal.

On May 29, 1986, the Brainerds voluntarily withdrew as counsel for Magnus; Magnus's new counsel eventually settled the case. Under the terms of the settlement, Magnus dismissed the suit and the defendants waived the $2,762.12 in sanctions assessed against Magnus.

The Brainerds objected in the district court to the magistrate's sanctions. The district judge adopted the magistrate's recommendation of $4,031.13 in sanctions and added some sanctions of his own. The district judge awarded Masco $2,600 in attorneys' fees for defending the motions brought in the district court and added an extra $1,000 to Masco's request in order to penalize the Brainerds. Scott Brainerd and his firm appeal the district court's award of attorneys' fees; Magnus takes no part in this appeal.

II. ANALYSIS

The district judge adopted the magistrate's recommendation to sanction Magnus's counsel pursuant to both Rule 11 and Rule 37 and added his own sanctions under Rule 11. Because the bulk of the sanctions come under Rule 11, we will begin by analyzing the claims under Rule 11 and discuss Rule 37 when it becomes pertinent.

Under Rule 11,[3] the district judge must determine, based on the objective record, whether a sanctioned party took a reasonable position under the circumstances. *Service*

[3] Specifically, Rule 11 states in part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed. R. Civ. P. 11.

Ideas, Inc. v. Traex Corp., 846 F.2d 1118, 1126 (7th Cir. 1988). A position is unreasonable if it is frivolous or improper. *Id.* An attorney takes a frivolous position if he fails to make a reasonable inquiry into facts (which later prove false) or takes a position unwarranted by existing law or a good faith argument for its modification. *See Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024, 1036 (7th Cir.), *cert. denied*, 109 S. Ct. 261 (1988). An attorney takes an improper stance if he files a paper for any inappropriate purpose, including a desire to delay the suit, harass the other party, or increase the costs of litigation. *Id.* Once the court has determined the reasonableness of the sanctioned party's position, it then must impose an "appropriate" sanction. *See Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1434 (7th Cir. 1987).

A. The Standard of Review

We first must examine what standard of review to apply to a district judge's decision to impose sanctions under Rule 11. We have previously stated that in determining whether the sanctioned attorney violated Rule 11 we will review questions of fact using a clearly erroneous standard but will examine questions of law *de novo*. *Beeman v. Fiester*, 852 F.2d 206, 209 (7th Cir. 1988); *see, e.g., S.A. Auto Lube, Inc. v. Jiffy Lube Int'l, Inc.*, 842 F.2d 946, 948 (7th Cir. 1988); *Brown*, 830 F.2d at 1434. Once we have examined the issue of whether the attorney violated Rule 11, we will then review the appropriateness of the sanction under an abuse of discretion standard. *See Brown*, 830 F.2d at 1434.

This circuit and other circuits, however, have recently questioned whether it is appropriate to review *de novo* a district judge's decision regarding the frivolity of a particular position taken by the sanctioned party. Although this court's precedents presently remain unsettled, we are not precluded from deciding the issues set before us in

the present case. *See Mars Steel Corp. v. Continental Illinois Nat'l Bank and Trust Co.*, No. 88-1554 (7th Cir. Feb. 16, 1989) (order setting *en banc* hearing on issue of applicable standard of review in sanctions cases). Applying any of the variations of the standard of review currently deemed appropriate in this circuit, we would reach the same decision regarding the district court's sanctions of the Brainerds.

B. The Magistrate's Sanctions

1. Discovery Related Matters

Having jurisdiction to review the district judge's decision pursuant to 28 U.S.C. § 1291, we will discuss the sanctions originally recommended by the magistrate separate from those added by the district judge. The magistrate recommended that the district judge sanction Magnus's counsel for two veins of activity. First, the magistrate ordered sanctions against both Scott Brainerd and his firm for moving to reconsider the magistrate's discovery order and failing to cooperate in the related discovery; and second, the magistrate suggested sanctions against Scott Brainerd for communicating with the magistrate *ex parte*.

We find that the motion to reconsider violated Rule 11. A motion to reconsider is frivolous if it contains no new evidence or arguments of law that explain why the magistrate should change an original order that was proper when made. *Cf. Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 83 (1987) (motion to reconsider with no new evidence is frivolous if district judge previously held that old evidence was insufficient); *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986) (motion to reconsider sanctions that merely reproduces the original motion to produce violates Rule 11). The magistrate described with commendable detail a number of incidents that indicate that his orders were well grounded in law and fact

but that the Brainerds' motion to reconsider was not. We need not discuss each of the Brainerds' claims in detail; we will, however, describe an incident that illustrates our decision.

The Brainerds refused to produce Rosalind and Frank Reinhard in Chicago for their depositions and moved to reconsider the magistrate's order that the Reinhards should be produced. The law supported the magistrate's order that the Brainerds produce the Reinhards as corporate officers in Chicago, Magnus's principal place of business. *See Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Zuckert v. Berkliff Corp.*, 96 F R.D. 161, 162 (N.D. Ill. 1982) ("As a general rule, the deposition of a corporation by its agents and officers should be taken at its principal place of business."); 8 C. Wright & A. Miller, Federal Practice & Procedure § 2112, at 410 (1970); 4 J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice ¶ 26.70[1.—4] (2d ed. 1987). The facts indicated that the Reinhards were officers of Magnus: In Magnus's 1984 and 1986 tax returns both Frank and Rosalind Reinhard were shown as officers of Magnus devoting 100% of their time to the corporation, and in Magnus's response to Masco's interrogatories, Frank Reinhard was listed as a person with knowledge of the facts of the complaint. Furthermore the Brainerds provided no evidence that the Reinhards had resigned from their previous positions. Despite these uncontroverted facts, the Brainerds asserted that the Reinhards were not officers at the time at issue. The law established that Magnus's officers should be deposed in Chicago; the unrefuted facts showed that Frank and Rosalind Reinhard were officers; and yet, the Brainerds refused to produce the Reinhards. The magistrate properly ordered the Brainerds to produce the Reinhards in Chicago. The Brainerds' motion to reconsider was frivolous because it reiterated their previous arguments with no new evidence or law to back their claim.

In the motion to reconsider, the Brainerds also argued that they had in fact complied with the original order by producing Rosalind Reinhard during the week of April 7.

As the magistrate pointed out, this was not in compliance with his orders. The magistrate had earlier rejected the week of April 7 because the Brainerds offered this date at a status hearing on April 2, which gave Masco's counsel too little time to prepare.

The Brainerds' position with regard to the Reinhards' depositions, in addition to violating Rule 11, also violates Rule 37. Rule 37(b)(2) states:

> If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may
>
> . . .
>
> . . . require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure.

Fed. R. Civ. P. 37(b)(2). We have in the past held that, if a party fails to comply with discovery, the district court may award attorneys' fees under Rule 37. *See Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 471 (7th Cir. 1984); *Weigel v. Shapiro*, 608 F.2d 268, 272 (7th Cir. 1979); *Ben Sager Chemicals Int'l v. E. Targosz & Co.*, 560 F.2d 805, 807 (7th Cir. 1977). *Cf. Smith v. Rowe*, 761 F.2d 360, 366 (7th Cir. 1985) (court may award attorney fees under Rule 37); *EEOC v. Kenosha Unified School Dist. No. 1*, 620 F.2d 1220, 1227 (7th Cir. 1980) (district court awards attorney fees but appellate court reverses because of government immunity). We review the district court's decision under Rule 37 using an abuse of discretion standard. *See Tamari*, 620 F.2d at 472. As the magistrate recommended, a court may sanction an attorney for repeatedly failing to produce a witness who the attorney was ordered to make available. *See Taylor v. Medtronics, Inc.*, No. 88-3069, slip op. at 21-22 (6th Cir. Nov. 22, 1988).

The record shows that the magistrate encouraged the Brainerds to comply and that the Brainerds stubbornly

refused to obey the magistrate's orders. The magistrate entreated to the Brainerds' sense of fairness:

> . . . I think that obviously we have got to consider what's reasonably fair in this case. And if the defendants are bringing people in when they have *no* obligation to do so, it seems to me that they're entitled to some measure of reciprocity.

The magistrate attempted reason:

> Mr. Brainerd: If [Frank Reinhard] does come into town we will make him available.
>
> Magistrate: Well, that's probably not quite good enough.
>
> . . .
>
> It's obviously much cheaper I would think for all of you to bring him in than to have all of the lawyers travel to California with all of the documents and depose him.
>
> Mr. Brainerd: Unquestionably.

Finally, when summarizing the discovery resolutions reached on April 2, the magistrate stated affirmatively that Magnus should bring Rosalind Reinhard to Chicago for her deposition. Appellants' Exhibit L at 3. The Brainerds did not object but did not make Rosalind Reinhard available either.

The Reinhard depositions were not isolated incidents of the Brainerds' noncompliance. The magistrate's findings, adopted by the district judge, indicate that the Brainerds failed to turn over to the magistrate an income tax return in their possession which the magistrate requested but the Brainerds asserted did not exist, inaccurately represented a prior order of the previous magistrate, entered discovery conferences in bad faith, filed requests for documents already tendered, and took arbitrary positions throughout the proceedings. The Brainerds have not presented evidence that would indicate that the findings were incorrect. We believe that it was within the district court's discretion to sanction Magnus's counsel under Rule 37.

2. The *Ex Parte* Communication

In addition to sanctioning Magnus's counsel for discovery related matters, the magistrate recommended $1,269 in sanctions under Rule 11 against Scott Brainerd for the *ex parte* communication with the magistrate. Although neither party discussed whether the district judge should have relied on Rule 11, we begin by addressing the question ourselves.

Rule 11 explicitly applies to *signed* papers. Fed. R. Civ. P. 11. *Cf. Reprosystem, B.V. v. SCM Corp.*, 630 F. Supp. 1099, 1102 (S.D.N.Y. 1986) (oral representations made in the course of negotiations not sanctionable under Rule 11). Given the unusual nature of the *ex parte* letter, we are not surprised that the district judge treated it like an affidavit and grounded his decision to impose sanctions in Rule 11. The letter obtained from the magistrate through the *ex parte* communication was not signed by Scott Brainerd, but Scott Brainerd submitted and relied upon the letter as support for a signed motion to amend the complaint. Scott Brainerd did not formally attach the letter to the motion because he wrongfully acquired and proffered it in the middle of the hearing. The district judge ordered the letter to be filed as part of the record. We have previously stated that a court may hold an attorney accountable under Rule 11 for affidavits that are "the result" of the attorney's work. *See Stewart v. RCA Corp.*, 790 F.2d 624, 632 (7th Cir. 1986).

Nevertheless, we need not decide today whether an unsigned letter submitted by an attorney in support of a signed motion satisfies Rule 11 because the district judge had another source of authority for imposing these sanctions. We believe that the district judge had authority to sanction Scott Brainerd pursuant to the inherent authority of a court to discipline attorneys practicing before it. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 622 (8th Cir. 1987); *Textor v. Board of Regents*, 711 F.2d 1387, 1394 (7th Cir. 1983); *McCandless v. Great Atlantic & Pacific Tea Co.*, 529 F. Supp. 476, 478 (N.D. Ill. 1982),

aff'd, 697 F.2d 198 (7th Cir. 1983). The district court possesses the "inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal." *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1209 (11th Cir. 1985). The district court must exercise its inherent powers with restraint and discretion because inherent powers, by their very nature, are shielded from direct democratic control. *Roadway Express*, 447 U.S. at 751. In keeping with that authority, the district court may assess costs and attorneys' fees against counsel who willfully abuse judicial processes. *See* 447 U.S. at 766; *Kleiner*, 751 F.2d at 1209; *Textor*, 711 F.2d at 1395. The district court may find willfulness, or bad faith, in the manner in which the attorney conducts the litigation. *See* 447 U.S. at 766.

Here the district judge had sufficient justification to exercise his inherent authority and sanction Scott Brainerd. According to the magistrate's findings, which the district judge adopted wholesale, the magistrate warned Scott Brainerd not to contact the courts without notifying opposing counsel. Scott Brainerd went to the magistrate's office anyway, fully aware that opposing counsel was waiting in the district courtroom at the time. *See* Appellants' Exhibit J at 2-3. Scott Brainerd then asked the magistrate's clerk to request from the magistrate a letter that explained the magistrate's position on the withdrawal issue. *See id.* This unrefuted record indicates that Scott Brainerd acted in direct contravention of the magistrate's instructions and with full awareness that opposing counsel was nearby. His actions were tantamount to willful disregard for the court's authority.[4]

[4] Scott Brainerd also tendered the *ex parte* letter to the district judge as a factually accurate description of the case. And yet, the letter misrepresented the status of the withdrawal issue. As the magistrate later admitted, in his haste to attend a scheduled court matter, he inaccurately added a sentence, specifically requested by Scott Brainerd, suggesting that no motions were pending before

(Footnote continued on following page)

Furthermore, this court and other courts have voiced in the past their disapproval for *ex parte* communications. *See Chicago, Milw., St. Paul & Pac. R.R. v. United States*, 585 F.2d 254, 263 (7th Cir. 1978); *Grieco v. Meachum*, 533 F.2d 713, 719 (1st Cir.), *cert. denied sub nom., Cassesso v. Meachum*, 429 U.S. 858 (1976); *cf. Home Box Office, Inc. v. FCC*, 567 F.2d 9, 53-54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). Rule 7-110(b) of the Illinois Code of Professional Responsibility states: "In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except . . . (3) orally upon adequate notice to opposing counsel . . . ." Ill. Ann. Stat. ch. 110A, Rule 7-110 (Smith-Hurd 1985). The record shows that Scott Brainerd deliberately sought to communicate *ex parte* with the magistrate and breached a settled rule of court. The district court had authority to sanction him.

C. The District Court's Sanctions

We now turn our attention to the sanctions added by the district judge. The district judge imposed an additional sanction on the Brainerds for "appealing" the magistrate's orders. The district judge stated: "Although purportedly

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[4] *continued*

him. This was erroneous because Masco's counsel had earlier asked to depose the Brainerds and the magistrate had not yet ruled on their request. *Compare* Appellants' Exhibit M at 20-25 *with* Appellants' Exhibit H. The magistrate did not realize his error at the time he wrote the letter.

Scott Brainerd did not merely fail to correct the magistrate; he affirmatively requested the erroneous sentence. As lead counsel for Magnus, Scott Brainerd should have been intimately aware of the issues previously argued before the magistrate and the issues that were still pending. He should not have requested what he should have known was an inaccurate description of the case. By using this letter containing a false statement of the facts, Scott Brainerd presented a factually inaccurate account of what transpired before the magistrate to the district judge.

'appeals' of the magistrate's order, the Brainerds' papers—running hundreds of pages and including in 'appendices' arguments which should have been included in the body of the briefs—are in fact frivolous attacks upon the magistrate and opposing counsel." The district judge does not describe with great specificity which positions he finds groundless. We find ample evidence in the record, however, to support his conclusion.

We infer from the district judge's comments that he found particularly frivolous the Brainerds' claims that the magistrate ruled against them because they had irritated the magistrate. We have reviewed the record and have found that the magistrate grounded his rulings in the law. And in fact, the magistrate did not rule against the Brainerds on all matters. The magistrate ruled that the Brainerds could continue to represent Magnus despite Masco's allegations that the Brainerds were witnesses to the release agreement. We do not believe that the magistrate was biased against the Brainerds. The Brainerds' position that the magistrate based his rulings on bias was factually frivolous.

The district judge also refers to the Brainerds' repeated requests for an evidentiary hearing on the allegedly disparaging comments made by Masco's counsel in the elevator. Although we commend Andrew Brainerd for attending to his reputation as an attorney and believe that attorneys should be civil to one another both inside and outside the courtroom, we agree with the district judge that belaboring the issue violated Rule 11. The purpose of Rule 11 is to discourage groundless, irrelevant proceedings. *Cf. Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988) (mountainous piles of unorganized documents and citation to nonexistent rules of law can lead to Rule 11 sanctions). One attorney's opinion of another, spoken in the elevator outside the courtroom, is normally not relevant to the underlying case and therefore is best ignored. The magistrate heard the parties' arguments with regard to this elevator incident and decided that the matter did not concern the underlying lawsuit. The Brainerds provided no additional evidence to the contrary when bring-

ing the motion before the district judge. Furthermore, we have examined the record and can only conclude that the matter was not part of the substantive dispute. It therefore was an irrelevant issue to the lawsuit. We believe that the district judge properly assessed the Brainerds for pursuing a matter irrelevant to the underlying lawsuit. We also find the Brainerds' due process argument to be without merit for similar reasons.

D. The Reasonableness of the Attorneys' Fees

Rule 11 requires the judge to impose sanctions that are reasonable and to specify the reasons for the sanctions and manner of computation. *See Brown*, 830 F.2d at 1437. Upon reviewing the record, we find that the fees were reasonably incurred and assessed with one exception. The district judge added a $1,000 sanction to the fees requested by Masco's counsel "as punishment for their [the Brainerds'] outrageous conduct throughout this lawsuit and in order to deter such conduct in the future." We find that the district judge unreasonably assessed the Brainerds by tacking on an arbitrary sum to the attorneys' fees requested.

A district judge, once the grounds for sanctions have been established, may impose various costs and expenses upon the attorney. The district judge is free to fine an attorney for the court's time, but that fine must be based on court costs and paid to the clerk's office. *See, e.g., Nixon v. Rose*, 631 F. Supp. 794, 797 (N.D. Ind. 1985); *Robinson v. Moses*, 644 F. Supp. 975, 982 (N.D. Ind. 1986). Similarly, a district judge may impose sanctions equivalent to the attorneys' fees reasonably incurred by opposing counsel. The district judge here, however, abused his discretion when he simply added an extra $1,000 to the fees requested by opposing counsel in order to penalize the Brainerds.

The district judge read *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, as support for his decision to impose an extra $1,000 penalty. While *Brown* does indicate that one of the purposes of Rule 11 is to deter at-

torneys from taking frivolous or improper positions, the decision read in its entirety does not permit a district judge to impose an arbitrary sum on the sanctioned attorney merely to emphasize a point. In fact, the court in *Brown* remanded the suit to the district court in order for that court to specify the manner in which the sanctions were computed. *See id.* at 1438. Furthermore, the *Brown* court commented on the deterrence rationale for Rule 11 sanctions as a way of explaining why a district court might impose a *lesser* amount of sanctions than the attorneys' fees requested. 830 F.2d at 1439. The court in *Brown* suggested that a nominal amount might be imposed to deter frivolous claims. *See id.* The district court's reliance on *Brown* was misplaced. For this reason we hold that the Brainerds need not pay the additional $1,000 to opposing counsel.

III. CONCLUSION

We decline to further sanction the Brainerds under Rule 38 of the Federal Rules of Appellate Procedure for appealing the district court's decision. We do not find the appeal to be completely frivolous or improper given the confused nature of the entire proceedings below and the Brainerds' legitimate complaint with regard to the extra $1,000 sanction.

We AFFIRM the district court's decision to sanction Scott Brainerd in the amount of $2,569.00 and the law firm of Brainerd & Bridges in the amount of $4,062.13, but VACATE the district court's decision to assess $1,000 more against appellants.

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APPENDIX B

No. 85 C 0494

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAGNUS ELECTRONICS, INC.,

Plaintiff,

v.

MASCO CORPORATION OF INDIANA, et al.,

Defendants.

MEMORANDUM OPINION

In a thoughtful and comprehensive memorandum and order, Magistrate Rosemond explained his decision to impose a total of $8,062.25 in sanctions and attorneys' fees and costs against Magnus and its attorneys under Rules 11 and 37 of the Federal Rules of Civil Procedure. Pursuant to a settlement of the underlying lawsuit, the $2,762.12 for which Magnus was responsible is no longer before this court. However, this court has retained jurisdiction over Magnus attorneys' — Scott A. Brainerd and the law firm of Brainerd & Bridges ("the Brainerds")--

appeal of the magistrate's imposition of $5,300.63 in sanctions against them directly.

Reviewing the magistrate's order under the "clearly erroneous or contrary to law" standard of Rule 72(a), see Johnson v. Old World Craftsmen, Ltd., 638 F. Supp. 289 (N.D. Ill. 1986), this court affirms the magistrate's decision in its entirety and adopts the magistrate's reasoning for the decision. Cf. Yates v. Mobile County Personnel Board, 719 F.2d 1530, 1532-33 ("When a magistrate's report meets [the adequate explanation requirements for an award of attorneys fees], clearly indicating how each . . . factor influenced his recommendation, we see no necessity for a trial judge to repeat the procedure if he is entering an order confirming and adopting the recommendation."). Moreover, this court hastens to add that, even were Rule 72(b) de novo review required, it would confidently affirm and adopt the magistrate's order.

Unfortunately, this court's duty does not end here. In Masco's initial reply to the Brainerd appeal from the magistrate's order, Masco asked for

an additional $500 in sanctions to cover the costs of defending the appeal. Following the Brainerds' subsequent motion for an "evidentiary hearing with respect to charges of the perpetration of felony crime made by [Masco's attorney] Walter Greenough . . . ", Masco sought further financial relief from the Brainerds' continuing frivolity.

Although purportedly "appeals" of the magistrate's order, the Brainerds' papers — running hundreds of pages and including in "appendices" arguments which should have been included in the body of the briefs — are in fact frivolous attacks upon the magistrate and opposing counsel. Nowhere do the Brainerds provide any factual or legal basis for their objections to the substance of the magistrate's decision. Accordingly, Masco's request for additional Rule 11 sanctions is granted for $2,600.00, the reasonable attorneys' fees incurred by Masco in litigating the appeals. Further, as punishment for their outrageous conduct throughout this lawsuit and in order to deter such conduct in the future, this court concludes that the Brainerds

should pay to Masco additional sanctions in the amount of $1,000.00. See Brown v. Healy, No. 86-2652, slip op. (Sept. 22, 1987).

CONCLUSION

The Brainerds' appeal of Magistrate Rosemond's imposition of sanctions in the amount of $1,269.00 against Scott A. Brainerd and $2,762.13 against Brainerd & Bridges is denied. Additional sanctions in the amount of $3,600.00 to be split evenly the appellants, is imposed by this court.

ENTER:

BRIAN BARNETT DUFF, JUDGE
UNITED STATES DISTRICT COURT

DATED: January 5, 1988

APPENDIX C

No. 85 C 0494

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAGNUS ELECTRONICS, INC.,

Plaintiff,

v.

MASCO CORPORATION OF INDIANA, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Magnus Electronics, Inc. moves the magistrate to reconsider his discovery order of April 7, 1986. Masco Corporation of Indiana, one of the defendants in this case, responds to the motion with a request for sanctions in the form of attorneys' fees and costs against Magnus. Masco maintains that the arguments presented by Magnus were groundless when they were originally made, and that Masco should not have to bear the cost of defeating them twice. The motion to reconsider is denied. Masco's prayer for attorneys' fees and

costs is granted.

Additional attorneys' fees and costs are sought as sanctions against Magnus[1] by Masco for Magnus' conduct in obtaining a written ex parte communication from the magistrate through misrepresentation and guise. That motion is also granted.

This decision is in two parts. Part I answers Magnus' challenges to the April 7 order. In addition, it deals Magnus' blind, stubborn pursuit of discovery into areas having no meaningful connection to the claims or defenses at issue, and Magnus' unyielding press of legal theories which were not well grounded in fact or law.

Part II concerns the oral motion of Masco for additional attorneys' fees and costs as sanctions against Magnus for its conduct in obtaining an ex

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[1] At times, a reference to Magnus will also be a reference to its counsel, Brainerd and Bridges, and in particular, Mr. Scott Brainerd. The reference does not include Ms. Stephanie W. Kanwit, who replaced Brainerd & Bridges as counsel for Magnus.

parte ruling from the magistrate on May 15, 1986.[2]

Background

A seven count complaint, filed on January 21, 1985, states that Magnus is an Illinois corporation with its principal place of business in Cook County. It states further that Magnus is engaged in the purchase of electronic components and assemblies from domestic manufacturers for sale and export to foreign customers.

The gist of the complaint is that Magnus contracted to purchase from defendant, Browning Communications, Inc., 200 RTS-V1 radio-telephone sets at a price of $1,957 per set. On April 23, 1984, purportedly as a result of Browning's defaults in payments on certain promissory notes owed to Masco, Masco, as a secured party, seized, through self-help measures, the 200 radio-telephone sets.

Magnus alleges that Masco seized the sets knowing full well that the sets had been bought and paid for

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2 The motion was made by Masco at the May 16, 1986 hearing set by the magistrate upon his discovery of the misrepresentations made to him by Magnus' counsel.

by Magnus, and were only stored on Browning's premises temporarily. The seizure and retention of the sets by Masco allegedly caused Magnus to sustain certain damages.

In order to obtain possession of the sets, Magnus signed a release prepared by Masco. The release absolved Masco of any liability resulting from its seizure of the sets. Magnus maintains that the release is a nullity because it lacked consideration, was obtained by fraud, and was signed by Magnus under duress.

All the counts in the complaint build upon the above alleged facts. They seek declaratory judgments concerning the ownership of the radio-telephone sets and the validity of the release, and they assert claims for conversion, intentional interference with business and trade relations, fraud, punitive damages and racketeering.

On June 3, 1985 Masco answered the complaint and counterclaimed against Magnus. Masco counterclaims that, in filing the present lawsuit, Magnus breached the oral and written agreements between Masco and

Magnus to the effect that if Masco turned over certain goods to Magnus, Magnus would release Masco from any and all claims Magnus might have regarding Masco's seizure of those goods. Masco alleges that Magnus' statements to and agreements with Masco that Magnus would release Masco from certain claims were false and fraudulent. Masco argues that it is evident from the present lawsuit, that at the time these statements and agreements were made, Magnus did not intend to release Masco from any claims.

Part I

A.

Magnus argues that the magistrate should reconsider his ruling sustaining defendant's objections to Magnus' Document Request No. 16, because of new developments in the case. The new development is that Magnus has moved the district court to amend its complaint to include specific allegations that Masco controlled, owned and totally financed defendant Browning.

This argument misses the mark. The ruling would have been the same even if Magnus had been

successful in obtaining leave of court to amend its complaint (which it was not).

Document Request 16, as modified, sought production of financial statements reflecting Masco's loss of its investment in Browning.[3] Magnus maintains that Browning was a de facto agent of Masco, and that Masco used Browning to perpetrate a fraud on Magnus. Magnus asserts that it needs certain of Masco's financial and accounting records in order to show from an accounting perspective how Masco controlled Browning. Magnus contends that it is critical to is case to be able to assess liability against Masco because Browning is a bankrupt corporation.

Magnus admitted at the April 2, 1986 hearing on these discovery matters that Masco had produced documents reflecting its 19% equity ownership in Browning, the amount of its loans to Browning, and a

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[3] Originally, the request sought any and all documents reflecting any loss or gain realized by Masco from its equity interest or loans to Browning. Magnus' November 19, 1985 "Motion To Compel Production Of Documents" modified the request to seek only financial statements.

document reflecting its write-off of its investment in Browning. Magnus further admitted that other documents allegedly showing Masco's control of Browning had also been produced. Masco represented to the magistrate that it had already given Magnus everything it had to establish control, and that it didn't believe that any other documents on the subject existed.

Whether or not Browning was controlled by Masco is irrelevant. If Masco unlawfully took Magnus' goods, Masco is liable to Magnus irrespective of who it controlled. Magnus maintained that proving control was essential to its fraud claims against Masco. The relevancy of discovery ont he profitability of Masco's investment in Browning to this issue was never made clear to the magistrate, while the burdensome and oppressive nature of such discovery was.

The document request was denied because (1) it sought irrelevant matter, and (2) Masco had already given Magnus everything it had on the subject. The proposed complaint amendment would not have changed

the ruling.

Magnus next challenges the magistrate's ruling on the deposition of Rosalind Reinhard. The magistrate's order states that Magnus agrees to product Peter and Rosalind Reinhard in Chicago for their depositions.[4] Magnus maintains that it only offered to make Rosalind Reinhard available for deposition in Chicago during the week of April 7. Alternatively, Magnus argues that Rosalind is neither a managing agent, employee, officer nor director of Magnus, and therefore her deposition must be taken where she resides - in California. The legal theories advanced by Magnus on this matter are not well grounded in fact or law.

The batter over where the Reinhards (Rosalind, Frank and Peter) should be deposed has been fought since the inception of the lawsuit. Magnus has stubbornly resisted producing them in Chicago even in the face of Magistrate Gottschall's suggestion that it do so:

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[4] The order should have referred to Frank, rather than Peter.

M. Gottschall: . . . I think that obviously we have got to consider what's reasonably fair in this case. And if the defendants are bringing people in when they have no obligation to do so, it seems to me that they're entitled to some measure of reciprocity.[5]

However, as the history of these discovery proceedings shows, Magnus does not respond to suggestions from the bench.

Masco was willing to produce Mr. Alan Krauss and Mr. James Melton in Chicago, if Magnus would produce the Reinhards in Chicago. Magnus conceded that this arrangement would be financially advantageous to it:

Mr. Brainerd: If [Frank Reinhard] does come into town we will make him available.

M. Gottschall: Well, that's probably not quite good enough.

* * *

It's obviously much cheaper I would think for all of you to bring him in than to have all of the lawyers travel to California with all of the documents and depose him.

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5 September 17, 1985 transcript of the proceedings before Magistrate Gottschall, at 59.

Mr. Brainerd: Unquestionably.[6]

Notwithstanding the fact that Magnus, itself, initially agreed that producing the Reinhards in Chicago for deposition would be financially advantageous to it, Magnus continues to do battle on the issue.

It is true that at the April 2d hearing Magnus only offered to produce Rosalind for her deposition during the week of April 7. However, the magistrate rejected this offer, stating that Masco may not wish to depose Rosalind at that time on such short notice.[7] Subsequently, when the magistrate was summarizing the discovery resolutions that had been

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[6] September 17, 1985 transcript at 55.

[7] The last minute concession to produce Rosalind in Chicago is indicative of the arbitrariness of Magnus. If Magnus knew that Rosalind would be in Chicago during the week of April 7, why didn't it contact opposing counsel and make the offer informally? Had Masco received sufficient advance notice of Rosalind's trip to Chicago, it might have been able to prepare for and take the deposition of Rosalind during the week of April 7. Why wait until the day set for oral argument on the matter to make the offer? Why waste the magistrate's time on the matter if Magnus was willing to produce her? This sudden change of mind or switch in position is arbitrary and typical of Magnus' conduct in this proceeding.

reached, the magistrate stated that Magnus agrees to bring the Reinhards to Chicago for the depositions. Magnus made no objection to the magistrate's understanding of the agreement that had been reached.

In any event, Magnus' refusal to produce the Reinhards in Chicago for their deposition is not well grounded in fact or law. As a general rule, the deposition of a corporation by its managing agents and officers should be taken at its principal place of business.[8] Magnus has continually maintained that the Reinhards are outside owners with no knowledge of the relevant facts of the case:

> Mr. Brainerd: Frank Reinhard "doesn't have direct knowledge of these events, in fact, none of them really [meaning none of the California deponents (Frank, Peter & Rosalind)]." Frank Reinhard "is an owner, but he is an outside owner who has not been involved in the participation."[9]

At the April 2d hearing before the magistrate, Masco

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[8] Zuckert v Berkliff Corp., 96 F.R.D. 161, 162 (N.D. Ill. 1981).

[9] September 17, 1985 transcript at 54 and 55.

demonstrated otherwise. Masco carefully led Magnus down the primrose path to its slaughter on this subject:

> Mr. Greenough:[10] Generally, a plaintiff is to appear in the forum that it has chosen. I would have to agree, however, that if Mr. and Mrs. Reinhard are not active or at the relevant time were not active in the affairs of the corporation, and were simply absentee-owners of it as Mr. Brainerd suggested to Magistrate Gottschall at page 55 of the transcript[11] . . . [where] Mr. Brainerd says "He's [Mr. Reinhard] not an employee, etc.," and Mr. Brainerd says "He's nothing to do with the company. He's simply an outside owner."[12] Now, I think that if that's true, that I'm probably not entitled to take his deposition here in Chicago under the prevailing law. That I would have to go to California to take that deposition. The question I have is whether or not that's true?
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> Mr. Brainerd: That is true, and he is not an employee. He is merely, they [Mr.

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[10] Mr. Walter C. Greenough is with the law firm of Schiff, Hardin & Waite, counsel for Masco. Ms. Barbara Hermansen is co-counsel.

[11] See transcript of the proceedings before the Honorable Joan Gottschall, magistrate (September 17, 1985).

[12] Id. at 55.

and Mrs. Reinhard] are merely owners or were owners at relevant times.

Mr. Greenough: Without knowledge of the facts of the case?

Mr. Brainerd: No. They have no direct knowledge.

Mr. Greenough: Your Honor . . . now we're talking. First, plaintiff's answer to our [Masco's] set of interrogatories . . . identify Frank Reinhard as being a person with knowledge of the facts of the complaint.

Mr. Brainerd: Through hearsay, yes.

Mr. Greenough: That's their interrogatory [answer], and it's not a hearsay question. Second, income tax returns produced by Magnus for the year June 30, 1984 . . . which is the time of the event in question in this case . . . would you look at the second page . . . both Frank and Rosalind [Reinhard] are shown not only as owners, but as having devoted 100% of their time to the affairs of Magnus.

Mr. Brainerd: They are no longer employees.[13]

The record further contradicts Mr. Brainerd's statement to Magistrate Gottschall, quoted previously, that "none of them", meaning the

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[13] See Official court tape recording of the April 2, 1986 hearing before the magistrate.

Reinhards, has any knowledge of the issues of this lawsuit. Peter Reinhard signed the release at issue, Peter verified Magnus' complaint, Peter and Frank are listed in "Plaintiff's Answers to Defendant Masco Corporation of Indiana's First Set of Interrogatories" as persons having knowledge of the facts underlying the complaint, and Peter verified Magnus' Answers to Masco's written interrogatories. The representation is further contradicted by Magnus' statements made at the April 2d hearing that "to the extent that we [counsel] listened to demands made by the defendants, the client was always on the phone or knew about the same demands.

Finally, all tax returns (1984 and 1985) presented to the court by Masco show that Rosalind, Peter and Frank are officers of Magnus who devote 100% of their time to the business. Magnus has presented no documents in support of any of its representations to the contrary. Since all documentation on record shows Rosalind, Peter and Frank to be Magnus officers, who devote 100% of

their time to the business, Magnus is required to produce them in Chicago for deposition.[14]

Magnus challenges, as it has many times before, the magistrate's refusal to enforce Magistrate Gottschall's order appointing a special master for all depositions. Magnus wants the costs of a special master assessed equally between it and Masco. Magnus' pursuit of this matter is not well grounded in fact or law.

Magistrate Gottschall did appoint a special master for depositions, but the parties rejected the person appointed. In any event, this magistrate ruled, on several occasions, that through his close supervision of discovery, he had, in effect, become a special master for the case. The magistrate offered to make his courtroom available for Chicago depositions and to be readily available, by telephone, to rule on objections to questions raised

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[14] Later, during the April 2d hearing, counsel for Magnus did state that if Masco would bring in Mr. Melton and Mr. barrow, he would bring in Rosalind and Frank Reinhard. Obviously, he was not sincere since he filed the motion to reconsider rather than pursue the matter informally with opposing counsel.

in out-of-town depositions. Under these circumstances, the need for a special master was non-existent. The appointment of special masters for depositions, all of whom would be required to expend a great deal of time and effort to become familiar with the case, would have been an unjust imposition of costs on the parties. No cogent arguments on how the appointment of special masters for depositions would be advantageous to the parties or how it would advance the case were offered by Magnus.

Moreover, the magistrate informed Magnus innumerable times that he was not bound by a prior magistrate's interlocutory order. As noted by Judge Plunkett in Alvarez v. Wilson:

> At the outset, we reject Defendants' argument that the issues decided by Judge Marshall are the "law of the case," and thus that we cannot reconsider Judge Marshall's rulings in this case. The Court of Appeals for the Seventh Circuit has held that a federal district judge may correct an earlier interlocutory ruling by another district judge which he or she finds to be erroneous. 600 F. Supp. 706, 708 (N.D. Ill. 1985), citing Diaz v. Indian Head, Inc., 686 F.2d 558, 562-563 (7th Cir. 1982).

Magnus' continued stubborn "harping" on this matter

was particularly puzzling in light of its purported interest in keeping its client's litigation expenses down.[15]

Magnus challenges the magistrate's ruling that the depositions of Mr. Dennis Barrow and Mr. James Melton must be taken where they reside. Under Rule 45 of the Federal Rules of Civil Procedure, the witness' place of business or residence controls where he may be deposed. Mr. Barrow and Mr. Melton are merely employees of Masco. Accordingly, Magnus is required to take their depositions at their residence or principal place of business.

Magnus' resistance to this ruling is not well grounded in fact or law for several reasons. First, Magnus never produced any evidence demonstrating that Mr. Barrow and Mr. Melton were anything but employees of Masco. Secondly, the issue had previously been raised and resolved against Magnus. At the September 7, 1985 hearing before Magistrate

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[15] See September 17, 1985 transcript of the proceedings before Magistrate Gottschall, at 21 to 24, wherein Magnus expresses concern over the costs of the litigation, and its desire to keep those costs down.

Gottschall, Magnus was told that Masco's employees must be deposed where they reside or at their principal place of business:

Mr. Greenough: Recent court case cited by Judge Aspen, Zuckert v. Berkliff Corp., 96 FRD 161.

M. Gottschall: Could I just take a look at that a minute?

Mr. Greenough: Absolutely. Just to make sure we understand each other, that's a case saying that defendants don't have to come into the forum state.

M. Gottschall: Well, that I'm well familiar with. That's the usual rule.[16]

Notwithstanding the fact that two magistrates have similarly ruled on the matter, Magnus continues to press the issue.

Moreover, had Magnus followed Magistrate Gottschall's suggestion to be more cooperative, the problem most likely would never have arisen.

Mr. Greenough: I have pulled a couple of cases which say that absent extraordinary circumstances defendant employees of a corporation are entitled to be deposed at their place of business, that absent extraordinary circumstances,

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[16] September 17, 1985 transcript at 57.

employees of a plaintiff corporation, that is at the top level, are to be deposed in the forum that they have chosen. So far I have voluntarily brought Mr. Krauss in.

Mr. Brainerd: I don't know that that was voluntary. The Court ordered him to come in.

Mr. Greenough: No, the Court didn't order him to come in. I have been willing to produce Mr. Melton . . .

* * *

M. Gottschall: Well, I think that counsel should try to work this out and try to set up a reasonable schedule for depositions. . . .

Mr. Greenough: My concern is that I'm going to be sandbagged that I brought in two people that I didn't really have to bring in and then I'm not going to get a person that I probably am entitled to get.[17]

Masco was willing to bring Mr. Alan Krauss to Chicago for his deposition, and did so.[18] Masco was

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[17] See September 17, 1985 transcript of the proceedings before Magistrate Gottschall, at 53 and 54. See also pages 55 through 60.

[18] Contrary to Magnus' assertion, Masco was not ordered by Magistrate Gottschall to produce Mr. Krauss for deposition in Chicago. Masco had already agreed to do so. Her order merely reflected that agreement. See August 16, 1985 transcript, at 17, and the September 17, 1985 transcript, at 53 and 54.

also willing to bring Mr. Melton to Chicago (and probably would have brought Mr. Barrow), in exchange for the three Reinhards. Magnus refused to reciprocate.

Magnus objects to the magistrate's order denying its request to reopen the deposition of Mr. Alan Krauss. The request was predicated on Magnus' assertion that certain relevant documents which should have been produced before Krauss' deposition were in fact produced after the deposition. Accordingly, argues Magnus, it must be permitted to depose Krauss on these lately produced documents.

The magistrate's ruling was based on several grounds. First, it was not demonstrated by Magnus that the post-Krauss-deposition documents were in fact traceable to pre-Krauss-deposition document requests. Second, Magnus failed to demonstrate that the deposition of Mr. Alan Krauss, a resident of London, England, had not, in fact, been completed.

In any event, the fact remained that the Krauss deposition was taken long before Magnus had completed its paper discovery. As a brief history

of the early stages of the litigation reveals, Magnus noticed up Alan Krauss' deposition unreasonably close to the date when Masco was to produce its documents pursuant to Magnus' document request.

On February 22, 1985 Masco filed a motion for a protective order with the Honorable George N. Leighton, a Judge of this Court.[19] The protective order sought to stay the time within which Masco was to respond to Magnus' Request for Admissions until 30 days after the Court's ruling on Masco's pending motion to dismiss. The motion for a protective order was granted.[20] Masco subsequently sought and obtained an extension of time to May 31, 1985 within which to respond to Magnus' request for admissions. The request for admissions was answered on May 31,

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[19] Masco was then represented by Mr. Douglas C. Tibble of the law firm of McDermott, Will & Emery. When it became apparent that he might be a fact witness in the case, Mr. Tibble filed for and obtained, on May 24, 1985, leave of court to withdraw as counsel.

[20] See Order of April 16, 1985 denying Masco's motion to dismiss and directing Masco to respond to Magnus' request for admissions within 30 days of the order.

1985.

On July 26, 1985 Masco moved to have the case assigned to a magistrate for supervision of discovery. The cause was assigned to Magistrate Gottschall for that purpose on July 30, 1985. Around July 31, 1985 Magnus served a document request upon Masco.

On August 16, 1985 Masco sought a stay of all discovery in the case, other than that relating to the disqualification of Magnus' counsel, until a ruling on the disqualification issue. Masco's stay motion was set for hearing before Magistrate Gottschall on the same day.

On August 16, 1985 Masco had not as yet produced the documents requested by Magnus, as they were not due until August 31.[21] Notwithstanding the fact that no document production was due from Masco until the end of August, Magnus had already noticed up the deposition of Mr. Alan Krauss for September 5 and

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21 See August 16, 1985 transcript of the proceedings before Magistrate Gottschall, at 8, 17 and 18. See also Magnus' September 1985 Motion To Compel Production of Documents.

6.[22]

The September 5 deposition date did not allow adequate time within which to resolve any potential disputes that might stem from the document request. In fact, Masco did object to certain of the requests. The risk that such disputes might not be resolved by September 5 was present from the very beginning, and Magnus simply didn't plan ahead.

Moreover, as evident from the fact that additional document requests were subsequently filed by Magnus, Magnus had not completed its paper discovery. No depositions should have been scheduled until Magnus had done so.[23] It's Magnus' burden to plan an appropriate discovery schedule. Errors in scheduling depositions must be borne by

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22 See August 16, 1985 transcript of the proceedings before Magistrate Gottschall, at 14.

23 The record shows that on November 22, 1985 Magnus filed a motion to compel the production of certain documents from Masco. As reflected by Magistrate Gottschall's minute order of December 6, 1985, Masco agreed to produce the documents sought to the extent that it had custody or control of same. The point of the matter is that document production did occur long after the Krauss deposition. Had Magnus planned better, it would not now be out of the cold.

Magnus.

Finally, and more importantly, Magnus failed to demonstrate the necessity for reopening the Krauss deposition. The magistrate asked counsel for Magnus to state the area of inquiry upon which he wished to depose Krauss at a second deposition. Counsel stated that he wished to ask Mr. Krauss was aware of all of Masco's alleged improper activities, and therefore, counsel wanted to ask Krauss (1) why he ordered the seizure of Magnus' radio-telephone sets; (2) whether he knew that the sets were incomplete; and (3) the state of his knowledge concerning Magnus' inventory of sets stored on the premises of Browning.[24]

This line of inquiry concerns the heart of the case, and should have been explored at the first deposition.[25] It has nothing to do with newly

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[24] See Official court tape recording of April 2, 1986 hearing before the magistrate.

[25] At the April 2d hearing, Magnus contended that it had not received full and complete responses from Krauss to this line of inquiry due to Krauss' evasive answers and Masco's frequent instructions to the deponent not to answer. If this be so, then Magnus should file a motion to compel responsive

produced documents. Thus, it was clear from counsel's response that Magnus had made a "bad" strategic decision in deposing Krauss before it had completed its paper discovery, and simply sought, through its motion to compel, to rectify what was ill-advised litigation strategy.

Finally, Magnus objects to the stay of plaintiff's discovery imposed by the magistrate pending resolution of the disqualification of counsel issue. This issue is moot. Upon further reflection, the magistrate determined that the disqualification of counsel issue was best handled in an adversarial context, and so informed all counsel in open court on May 7, 1986. On May 7 the magistrate lifted the stay on discovery, concluding that he had done all that he was required to do by bringing the potential conflict of interest problem to Magnus' attention. The magistrate stated that he would not rule on the matter unless and until Masco

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answers from Krauss, rather than a motion to re-take his deposition. And, in fact, Magistrate Gottschall so recommended. See September 17, 1985 transcript, at 22.

filed a motion to disqualify Magnus' counsel based upon Masco's discovery. The stay was of a short duration, and could not have prejudiced Magnus.

B.

Subpart A above dealt with specific challenges of Magnus to the magistrate's order of April 7, 1986. Subpart B concerns the magistrate's rulings on several of Magnus' discovery requests to which no challenge is made. Discussion of Magnus' conduct with respect to a few of the other discovery matters helps to paint a more complete picture of Magnus' conduct throughout the discovery in this case. An appreciation of all of the facts is necessary to better understand the magistrate's reasons for imposing Rule 11 and Rule 37 sanctions in the form of attorneys fees and costs against Magnus.

Magnus sought a more responsive answer to Interrogatory 6 of its first set of interrogatories, which read as follows:

> 6. If it is Masco's contention that Magnus owed money to Browning at the time of Masco's seizure of radio-telephone sets on Browning's premises, please state the amount then owed by Magnus to Browning, with support data and computations.

Answering for the second time, Masco stated that it believed that Magnus owed Browning approximately $64,550 as set forth in Exhibit B to Masco's prior answers to Magnus' first set of interrogatories. Masco stated further that it was advised of this figure by Browning, that it did not possess any data supporting the figure, and that it assumed such data was in the possession of Browning.

Apart from the fact that the answer is responsive, and apart from the fact that Magnus pressed the matter to hearing without ever specifically delineating what was unresponsive about the answer, the actual reason why Magnus pressed the matter to hearing was completely unrelated to discovery and had absolutely nothing to do with obtaining an answer to the interrogatory.

Magistrate: Interrogatory 6.

* * *

Mr. Brainerd: Actually, this has been aired under one of the interrogatory requests before. The issue was that whether . . . Masco is claiming that Magnus owed $65,000 roughly. They say that the data supporting this figure is in the possession of Browning. What plaintiff simply wants here is an order either

> that Masco compel further substantion for that or that it be disbarred in the future from denying or contradicting plaintiff's claim that it owed no money to Browning at the time that a certain release was executed.

Magistrate: His [Mr. Greenough's] response is that he doesn't have it [it meaning any more data on the subject]. And you don't believe that, is that the case?

Mr. Brainerd: Well, I'm not saying that I don't believe it. I'm just saying that we just simply want an order such as a motion in limine . . . where if they fail to produce requested discovery, in discovery, that they be prevented later from contesting that issue.

Magistrate: O.K.[26]

The purpose of the hearing was to resolve the discovery conflicts of the parties. If Magnus had no problems with Masco's response to Interrogatory 6, as apparently it did not, why trouble the magistrate? If Magnus was making an oral motion in limine, a hearing on discovery motions was neither the place nor the time to do it.[27]

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26 See Official court tape recording of April 2, 1986 hearing before the magistrate.

27 Magnus' reasons for pressing Interrogatory 14 to hearing were the same as those it had for Interrogatory 6.

Interrogatory No. 5. This interrogatory asked Masco to state whether it used the cost method or equity method in recording its investment in Browning for financial accounting purposes. The interrogatory was withdrawn by Magnus per its March 20, 1986 letter to the magistrate. At the hearing, Magnus reinstated its request seeking a response to the interrogatory. Then, Magnus suspended the interrogatory until the magistrate ruled on another discovery request.[28] The point is this — either Magnus wanted the information or it didn't. Its fickleness in this regard was disturbing to the magistrate and opposing counsel because neither had given Interrogatory 5 any thought due to the fact that the interrogatory had previously been withdrawn from consideration. Later in the hearing, Magnus did the same thing with respect to Interrogatories 6 and 8.[29]

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28 See Official court tape recording of the April 2, 1986 hearing before the magistrate.

29 Interrogatory 8 asks Masco to state whether at any time before Masco's seizure of radio-telephone sets from Browning premises on April 23, 1984, any agent or employee of Masco informed any

In a somewhat similar vein is the following. The parties were directed to prepare proposed discovery schedules which, among other things, listed the witnesses to be deposed. Magnus listed the Browning accountants. At the hearing Magnus informed the magistrate and opposing counsel that the listing, "Browning Accountants," should read "Masco Accountants." This correction caught opposing counsel by surprise, and he declined, quite correctly, to argue the matter until he had time to reflect on the request.

The incident is noted for this reason. The magistrate had ordered that when a discovery impasse was reached between the parties, the matter was not to be left unresolved or "hanging" for more than three days. At the end of the three day period, the moving party was to submit a letter to the magistrate setting forth the reasons why the sought discovery was relevant. Upon receipt of a copy of

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agent or employee of Magnus [of] that [meaning the seizure] and who notified whom. The question seems pointless, since Magnus ought to know whether it was told about the seizure and by whom.

such a letter, the objecting party was to send a letter to the magistrate (copy to the movant) setting forth the basis for any objections. The magistrate would either rule on the matter or set it for hearing.

Had Magnus thoughtfully complied with the order, the error concerning whose accountants were to be deposed would have been corrected before the hearing. Indeed, had Magnus given any thought to what discovery it needed and wanted, there would have been no need to waste the magistrate's time with respect to Interrogatories 5, 6 and 8, and errors which should have been obvious to Magnus would have been caught.

These incidents are noted because they reflect Magnus' continued refusal to cooperate with opposing counsel by discussing discovery disputes fully at Rule 12(d) conferences. Masco had brought Magnus' refusals to fully disclose discovery disputes at Rule 12(d) conferences to Magistrate Gottschall's

attention.[30] To have to deal with matters which could have been resolved at Rule 12(d) conferences had Magnus been more cooperative, was wearisome, distracting, and a waste of the magistrate's time.

Also wearisome was the fact that Magnus too often made inaccurate representations to the magistrate and opposing counsel. By order of April 7, 1986, the magistrate directed Magnus to produce all income tax returns and related data previously requested by Masco. A few days later, in a telephone conference between the magistrate and all counsel, counsel for Magnus represented to the magistrate and opposing counsel that he could not comply with the order because the tax returns for 1985 did not exist. The magistrate then told opposing counsel that he could not order Magnus to produce what it didn't have. The magistrate directed Magnus to forward a letter to Masco to provide a written confirmation of the representation for the record. Masco was so advised by Magnus by letter dated April 14, 1986:

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[30] See September 17, 1985 transcript of the proceedings before Magistrate Gottschall, at 28.

> Pursuant to the Magistrate's order of April 7, 1986, to the best of my knowledge, plaintiff has submitted all income tax returns which have been prepared to date. If and when additional requested income tax returns are prepared, they will be forwarded to your office.

Shortly after April 14, 1986, Magnus filed with Masco its "Answer And Objections To Masco's Second Request For Production Of Documents." Appended to the document was Magnus' tax return for the fiscal year ending June 30, 1985. The return had been prepared on March 13, 1986, and received by the Director of Internal Revenue on March 17, 1986.

It is evident from the above that while Magnus counsel was telling the magistrate and opposing counsel that Magnus did not have a 1985 income tax return, the return was in fact in its possession all the time. Counsel for Magnus counters by stating that he did not know the true facts. We reject that.

There is no question that counsel for Magnus is under an obligation to the magistrate and opposing

counsel to find out the truth of the matter.[31] Counsel cannot sit back and assume whatever he wishes.

On the same note, Magnus engaged in the distracting practice of bombarding the magistrate with the prior rulings of Magistrate Gottschall, Judge Leighton, and Judge Duff, without ever producing a copy of such orders. By letter dated March 25, 1986, Mr. Brainerd represented to the magistrate the existence of the following rulings:

> Plaintiff wishes to note by this letter certain objections to the depositions proposed by defendant, as follows:
>
> 1) With respect to Masco employees, plaintiff wishes to take their deposition in Chicago. These employees include Krauss, Melton, Barrow and Atchinson. Plaintiff believes this request conforms to the dictates of the rulings and schedules previously existing in this case under Magistrate Gottschall.

By order of March 26, 1986, the magistrate directed Magnus to bring copies of the rulings referred to in its March 25, 1986 letter to the April 2, 1986 hearing. We are still waiting for those copies. We

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[31] It is undisputed that a party has a duty to provide all information available to him. See Trane Co. v. Kluznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980).

have combed the file, and have been unable to find such orders. We conclude that the orders do not exist, and that a number of the other orders, from time to time referred to by Magnus, also do not exist.[32]

Magnus was admonished by the magistrate, on several occasions, not to refer to orders unless it had a copy of the order handy. Because Magnus did not comply with the magistrate's directives on this matter, the magistrate put it in writing in his April 7, 1986 order. On the sole occasion when Magnus produced a copy of an order in support of its representations, the order did not in any way support the representation.

Finally, we note another matter. For the longest time Magnus battled before Magistrate Gottschall and the magistrate over matters unrelated to the case. Specifically, Magnus was persistently pursuing an evidentiary hearing on the truth or falsity of certain unflattering statements made by opposing

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[32] The record only reflects an agreed order wherein Masco agreed to produce Mr. Krauss in Chicago. See footnote 18, supra.

counsel about Magnus' counsel and their conduct throughout the case. Pursuit of the evidentiary hearing was a complete waste of time, effort and money. Eventually, the magistrate denied Magnus' motion for an evidentiary hearing on this matter.

The record shows that Magnus has been uncooperative with opposing counsel on discovery matters, it has not engaged in Rule 12(d) conferences in good faith, it has been arbitrary and whimsical with respect to certain positions taken on discovery matters, it has filed frivolous motions, it has pressed legal theories which were not well grounded in fact or law, it has reneged on agreements made to the magistrate in open court, it too often has been inaccurate in its factual representations to the magistrate, and it has been less than truthful. Magnus' conduct has been irresponsible and unacceptable.

What has occurred before the magistrate is not an isolated incident. In Magnus Electronics, Inc. v. Royal Bank of Canada,[33] Judge Shadur of this court

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[33] 611 F.Supp. 436 (N.D. Ill. 1985).

complained of Magnus' "less than forthright" and "less-than-candid" efforts in drafting the allegations of its complaint.[34] He found the allegations in the complaint "disingenuous."[35]

More recently, on the subject of advancing frivolous legal theories, Judge Shadur admonished Magnus that it was "nothing less than irresponsible for Magnus' counsel to have advanced [a] wholly groundless diversity basis for jurisdiction."[36] Judge Shadur found Magnus' legal theories to be "shallow" and granted, in part, opposing counsel's request for Rule 11 sanctions.[37]

The fact that sanctions are finally being assessed against Magnus should come as no surprise to it. The magistrate's order of May 7,1 986 directing Magnus to respond more fully and with greater specificity to certain of Masco's

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34 Id. at 443 and 444.

35 id. at 445.

36 Magnus Electronics, Inc. v. Argentine Republic, Case No. 85 C 10557, at 4 (May 7, 1986).

37 Id. at 14 and 21.

interrogatories was issued to stop Magnus' practice of (1) giving incomplete and inadequate answers to interrogatories, 92) producing documents in lieu of answers, and (3) referring to documents which had yet to be produced to Masco. The order was also issued to provide a visible and concrete basis for imposing Rule 37 sanctions against Magnus for its unresponsive answers.[38] From the bench, the magistrate directed Magnus counsel to advise their client that if the Masco interrogatories were not answered properly, Magnus would find itself paying some of Masco's attorneys' fees and costs.

Attorneys may not make assertions of law for which there is no support.[39] Attorneys who put the burden of study and illumination on the court must expect to pay Rule 11 attorneys' fees and costs.[40]

At the May 16, 1986 hearing, the magistrate

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[38] Incomplete or false answers to written interrogatories justify an order under Rule 37 imposing sanctions. See Evanston v. Union Oil Co. of California, 85 F.R.D. 274, 277 (D. Minn. 1979).

[39] Thornton v. Wahl, Slip. Op. No. 85-2786, at 3 (7th Cir. April 3, 1986).

[40] Id.

directed Masco to submit a schedule of attorneys' fees and costs commencing from the time when Masco counsel began preparing for the April 2d hearing on Magnus' letter motions to compel. In response to the order, Masco submitted an application for fees in the amount of $5,524.25.

Magnus objects to the fees on several grounds. First, Magnus argues that some of Masco's attorneys fees would have been incurred regardless of Magnus' motions to compel. Finally, Magnus suggests, without offering any reason for it, that the fees be reduced by one-half.

We have reviewed the time records and the hourly rates of Masco counsel, and find the work performed and the fees charged reasonable. Accordingly, Masco is awarded its fees in their entirety. One-half of the fees are assessed against Magnus, and the other half, against its counsel, Brainerd & Bridges.

Part II

On May 15, 1986 Mr. Scott Brainerd left the courtroom of the Honorable Brian Barnett Duff, a Judge of the United States District Court for the

Northern District of Illinois, where opposing counsel was sitting, entered the chambers of the magistrate, and represented to the magistrate's staff that Judge Duff wanted a letter on the status of the disqualification of counsel issue, and was on the bench, waiting for the letter.[41] Mr. Brainerd's message was relayed to the magistrate.

Unbeknownst to Mr. Brainerd, all the circumstances were favorable for making his message credible. Just two weeks prior to Mr. Brainerd's visit, another Judge of this Court sent the attorneys on both sides to the magistrate's chambers with instructions not to leave until the magistrate had ruled on a motion which that Judge believed had

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41 Magnus was before Judge Duff on a motion to amend its complaint to (1) add allegations of agency in order to be able to seek discovery on its control theory which the magistrate had ruled was irrelevant to the issues in the case, and (2) delete references to Magnus counsel on the shallow hope that such a deletion would enable counsel to escape disqualification in the case. However, Magnus should have known that this practice was unacceptable because Judge Shadur had previously admonished Magnus about seeking occasions to reshape "the facts to fit whatever loophole may remain unclosed by [a court's] rulings." Magnus Electronics, Inc. v. Argentine Republic, Case No. 85 C 10557, at 15 (May 7, 1986).

been pending with the magistrate for too long. Therefore, Mr. Brainerd's message did not seem out of the ordinary in light of what had just recently happened to the magistrate.

The circumstances were further favorable to Mr. Brainerd because the magistrate was in a hurry to attend to a scheduled matter in the courtroom. Additional pressure was added by Mr. Brainerd, himself, who impressed upon the magistrate's staff the urgency of the situation.

Accordingly, the magistrate hastily drafted a letter to Judge Duff. The first draft of the letter given to Mr. Brainerd wa an accurate description of the situation. However, Mr. Brainerd suggested to staff that the magistrate add an additional sentence for the sake of clarity. The magistrate added that sentence. The sentence, "Nothing on this matter is pending before me," was not accurate. In his haste, the magistrate had forgotten that the issue of whether Masco would be permitted to depose Magnus counsel on the disqualification of counsel question was still under advisement.

At the May 16, 1986 hearing before the magistrate on this matter, Mr. Brainerd stated that he had not made the representation that Judge Duff had ordered him to come down to the magistrate's chambers. It is true that these exact words were not used. But he words that were used suggested to the magistrate that the letter was a direct request from Judge Duff.

We will not quibble with Mr. Brainerd. The fact remains that the magistrate addressed a letter to Judge Duff on the disqualification of counsel issue, and would not have done so, had he not been laboring under the belief, conveyed by Mr. Brainerd, that it was Judge Duff's request that he do so.

Even were we to give Mr. Brainerd the benefit of the doubt on this matter, his conduct was still unacceptable. Rather than consult with opposing counsel on the matter, who was sitting in Judge Duff's courtroom, Mr. Brainerd thoughtlessly, or with thought, surreptitiously sought and obtained an ex parte communication from the magistrate concerning a matter under advisement.

Several weeks prior to this incident, Mr. Brainerd had called the magistrate's chambers to speak to the court deputy on a procedural matter. The call was made shortly after 5:30 P.M. Staff had long left for the day, and the magistrate answered. The next day the magistrate held a telephone conference with Masco and Magnus counsel, and informed Masco of the call and the procedural inquiry. Although aware of the fact that the contact with the magistrate had occurred innocently, the magistrate admonished Mr. Brainerd to be alert to the problem of ex parte communications because discussions on procedural matters might inadvertently turn to the merits, and thus he must avoid creating circumstances where that might occur. That warning fell on deaf ears.

We award Masco its attorneys fees and costs incurred in connection with this matter. The fees are $1,269.00, and are assessed against Mr. Scott Brainerd.

Accordingly, it is adjudged, decreed and ordered. Masco is awarded $6,793.25 as Rule 11 and Rule 37

sanctions against Magnus. Of that amount, $1,269.00 is assessed directly against Mr. Scott Brainerd. Of the remainder, one-half is assessed against Magnus, and the other half, against its counsel, Brainerd & Bridges.

SO ORDERED.

Dated: September 5, 1986.

W.Thomas Rosemond, Jr.
United States Magistrate